



Comptroller General
of the United States

Washington, D.C. 20548

M. Wolcott

Decision

Matter of: Unity Corporation

File: B-241963

Date: March 11, 1991

Jeffrey S. Estabrook, Esq., Bolger, Picker, Hankin & Tannenbaum, for the protester.
Lori S. Chofnas, Esq., Department of the Navy, for the agency.
Glenn G. Wolcott, Esq., Paul I. Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency improperly awarded contract to offeror whose proposal failed to satisfy material terms and conditions of the solicitation.
2. Where requirements under improperly awarded contract have been performed, protester is entitled to reimbursement of its protest and proposal preparation costs, but not to lost profits.

DECISION

Unity Corporation protests the Department of the Navy's award of a contract for asbestos removal services to Mid-Atlantic Services, Inc. under request for proposals (RFP) No. N00140-90-R-5855. Unity asserts that the award to Mid-Atlantic was improper because that firm failed to satisfy the corporate experience requirements contained in the RFP.

We sustain the protest.

The RFP was issued on October 1, 1990, for asbestos insulation removal services to be performed aboard the U.S.S. Constellation while the ship was dry-docked at the Philadelphia Naval Shipyard. Distribution of the RFP was limited to five firms based on a justification and approval (J&A) authorizing

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limited competition due to the government's immediate need for the services. Section C of the RFP stated:

"CONTRACTORS MUST MEET MINIMUM EXPERIENCE CRITERIA
BY PROVING RECENT EXPERIENCE IN AT LEAST THREE
ASBESTOS REMOVAL CONTRACTS (CERTIFIED BY OSHA) WITH
A MINIMUM DOLLAR VALUE OF \$100,000.00 EACH."
(Capitalization and underlining in original.)

By the October 22, 1990, closing date, the Navy received four proposals including those of Unity and Mid-Atlantic. On October 26, the Navy awarded a contract to Mid-Atlantic. On October 31, Unity filed a protest with the Navy asserting that Mid-Atlantic did not meet the RFP requirement for prior performance of asbestos removal contracts. On November 5, 1990, before receiving a response to its agency protest, Unity filed a similar protest with our Office.^{1/}

After receiving Unity's protests, the contracting officer determined that, although Mid-Atlantic had referenced three prior contracts in its proposal, only two of those contracts actually satisfied the solicitation criteria. The contracting officer therefore concluded the contract had been improperly awarded and that, under normal circumstances, Mid-Atlantic's contract should be terminated, negotiations reopened and a new award made.^{2/} However, because the asbestos removal services were urgently needed and Mid-Atlantic had already begun performance, the contracting officer concluded that continued contract performance by Mid-Atlantic was necessary. Accordingly, a new J&A was generated authorizing the Navy to

^{1/} Our Office received the protest late in the afternoon of November 5--the 10th day after contract award. We notified the Navy the following morning, as required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(b)(1) (1988). Since the agency was not notified of the protest within 10 days after contract award, suspension of performance was not required by CICA. 31 U.S.C. § 3553(d)(1).

^{2/} The agency asserted that a new contract could not have been awarded to another offeror on the basis of the proposals submitted because none of the offerors, including Unity, complied with all of the RFP requirements. The agency states that Unity failed to provide with its proposal certain information required by the RFP concerning certification of its employees. Unity states that the allegedly missing information was in the Navy's possession as a result of other work Unity had recently performed on the U.S.S. Constellation under other contracts. The agency has not contradicted this statement.

contract with Mid-Atlantic on a sole-source basis. Subsequently, the Navy terminated the contract for default because Mid-Atlantic failed to comply with the contract's terms, and the Navy completed the work with its own employees at the Philadelphia Naval Shipyard.

The Navy concedes that the initial award of the contract to Mid-Atlantic was improper due to Mid-Atlantic's failure to comply with a material solicitation requirement. Nonetheless, the Navy maintains that the J&A authorizing Mid-Atlantic's continued performance on a sole-source basis constituted appropriate corrective action. The Navy argues that this corrective action renders Unity's protest academic and maintains that we should dismiss the protest on that basis. We disagree.

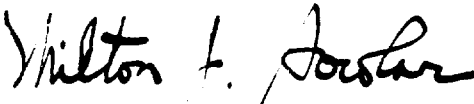
CICA places on this Office the responsibility for determining whether a procuring agency has made an award in violation of statute or regulation, and, where appropriate, to award costs to an aggrieved party. 31 U.S.C. § 3554(c)(1). Our responsibility in this regard is not nullified in situations such as this where circumstances occurring after a violation has occurred make it impracticable to permit the protester to compete for the contract requirements. See Eklund Infrared, B-238021, Mar. 23, 1990, 90-1 CPD ¶ 328; Sierra Eng'g, B-237820, Jan. 16, 1990, 90-1 CPD ¶ 58.;

In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. See, e.g., Eklund Infrared, B-238021, supra; Biegert Aviation, Inc., B-222645, Oct. 10, 1986, 86-2 CPD ¶ 419. The Navy does not dispute the impropriety of its award to Mid-Atlantic. Accordingly, the protest is sustained.

Unity asserts it is entitled to protest costs, proposal preparation costs and to the profits it would have earned had it been awarded the contract. Since the Navy improperly made the initial award to Mid-Atlantic, Unity is entitled to recover the costs of filing and pursuing its protest in our Office, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1)(1990).^{3/} Since the contract work is completed, Unity is also entitled to recover

^{3/} Unity is not entitled to the costs of pursuing its agency protest as we have authority only to award protest costs incurred pursuant to a protest filed with this Office. 31 U.S.C. § 3554(c)(1); Aero Technology Co., B-227374, Sept. 25, 1987, 87-2 CPD ¶ 301.

its proposal preparation costs. 4 C.F.R. § 21.6(d)(2);
Jarrett S. Blankenship, B-237584, Mar. 8, 1990, 90-1 CPD
¶ 258. Unity is not entitled to recovery of lost profits as
there is no legal authority which permits the recovery of
anticipated profits, even where an offeror has been wrongfully
denied the award of a contract. See, e.g., Ralph Turnbull--
Claim for Costs and Lost Profits, B-238399, Feb. 12, 1990,
90-1 CPD ¶ 183; Consolidated Devices, Inc., B-228065, Aug. 24,
1987, 87-2 CPD ¶ 201.

for 
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